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## Presidential Signing Statements: Constitutional and Institutional Implications

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# **Presidential Signing Statements: Constitutional and Institutional Implications**

## **Summary**

Presidential signing statements are official pronouncements issued by the President contemporaneously to the signing of a bill into law that, in addition to commenting on the law generally, have been used to forward the President's interpretation of the statutory language; to assert constitutional objections to the provisions contained therein; and, concordantly, to announce that the provisions of the law will be administered in a manner that comports with the Administration's conception of the President's constitutional prerogatives. While the history of presidential issuance of signing statements dates to the early 19<sup>th</sup> century, the practice has become the source of significant controversy in the modern era as Presidents have increasingly employed the statements to assert constitutional objections to congressional enactments. President Reagan initiated this practice in earnest, transforming the signing statement into a mechanism for the assertion of presidential authority and intent. President Reagan issued 276 signing statements, 71 of which (26%) contained provisions questioning the constitutionality of one or more of the statutory provisions signed into law. President George H. W. Bush continued this practice, issuing 214 signing statements, 146 of which (68%) raised constitutional objections. President Clinton's conception of presidential power proved to be largely consonant with that of the preceding two administrations. In turn, President Clinton made aggressive use of the signing statement, issuing 391 statements, 105 of which (27%) raised constitutional concerns or objections. President George W. Bush has continued this practice, issuing 128 signing statements, 110 of which (86%) contain some type of constitutional challenge or objection. The significant rise in the proportion of constitutional objections made by the President Bush is compounded by the fact that these statements are typified by multiple objections, resulting in over 700 challenges to distinct provisions of law. The number and scope of such assertions in the George W. Bush Administration has given rise to extensive debate over the issuance of signing statements, with the American Bar Association (ABA) recently publishing a report declaring that these instruments are "contrary to the rule of law and our constitutional separation of powers" when they "claim the authority or state the intention to disregard or decline to enforce all or part of a law...or to interpret such a law in a manner inconsistent with the clear intent of Congress."

However, in analyzing the constitutional basis for, and legal effect of, presidential signing statements, it becomes apparent that no constitutional or legal deficiencies adhere to the issuance of such statements in and of themselves. Rather, it appears that the appropriate focus of inquiry in this context is on the assertions of presidential authority contained therein, coupled with an examination of substantive executive action taken or forborne with regard to the provisions of law implicated in a presidential signing statement. Applying this analytical rubric to the current controversy, it seems evident that the issues involved center not on the simple issue of signing statements, but rather on the view of presidential authority that governs the substantive actions of the Administration in question. This report focuses on the use of signing statements by recent Administrations, with particular emphasis on the current Administration and legislative proposals (H.R. 5486, H.J.Res. 87, H.J.Res. 89 and S. 3731) to regulate the use and issuance of signing statements.

## **Contents**

Introduction .....	1
Historical Usage and Constitutional Basis .....	2
A. Signing Statements in the Reagan Administration .....	3
B. Signing Statements in the George H.W. Bush Administration .....	5
C. Signing Statements in the Clinton Administration .....	5
D. Signing Statements in the George W. Bush Administration .....	8
Legal and Constitutional Implications of Signing Statements .....	11
Substantiality of Constitutional Objections .....	14
Foreign Affairs Power and Executive Privilege .....	15
Direct Reporting Requirements .....	18
Legislative Veto Provisions .....	19
Institutional Implications of Signing Statements .....	21
Statutory Construction and the Courts .....	21
Impact on Congress .....	23
Conclusion .....	27

# Presidential Signing Statements: Constitutional and Institutional Implications

## Introduction

Presidential signing statements are official pronouncements issued by the President contemporaneously to the signing of a bill into law that, in addition to commenting on the law generally, have been used to forward the President's interpretation of the statutory language; to assert constitutional objections to the provisions contained therein; and, concordantly, to announce that the provisions of the law will be administered in a manner that comports with the Administration's conception of the President's constitutional prerogatives.<sup>1</sup> While the history of presidential issuance of signing statements dates to the early 19<sup>th</sup> century, the practice has become the source of significant controversy in the modern era as Presidents have increasingly employed the statements to assert constitutional objections to congressional enactments.<sup>2</sup> The number and scope of such assertions in the George W. Bush Administration in particular has given rise to extensive debate over the issuance of signing statements, with the American Bar Association (ABA) recently publishing a report declaring that these instruments are "contrary to the rule of law and our constitutional separation of powers" when they "claim the authority or state the intention to disregard or decline to enforce all or part of a law...or to interpret such a law in a manner inconsistent with the clear intent of Congress."<sup>3</sup>

However, in analyzing the constitutional basis for, and legal effect of, presidential signing statements, it becomes apparent that no constitutional or legal deficiencies adhere to the issuance of such statements in and of themselves. Rather, it appears that the appropriate focus of inquiry in this context is on the assertions of presidential authority contained therein, coupled with an examination of substantive executive action taken or forborne with regard to the provisions of law implicated in a presidential signing statement. Applying this analytical rubric to the current controversy, it seems evident that the issues involved center not on the simple issue of signing statements, but rather on the view of presidential authority that governs the substantive actions of the Administration in question. This report focuses on the use

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<sup>1</sup> Philip J. Cooper, "George W. Bush, Edgar Allan Poe and the Use and Abuse of Presidential Signing Statements," *Presidential Studies Quarterly* 35, no. 3, at p.517 (September, 2005).

<sup>2</sup> Christopher N. May, "Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative," 21 *Hastings Const. L.Q.* 865, 932 (1994).

<sup>3</sup> American Bar Association, Report of the Task Force on Presidential Signing Statements and the Separation of Powers Doctrine at p.5 (August, 2006).

of signing statements by recent Administrations, with particular emphasis on the current Administration.

## **Historical Usage and Constitutional Basis**

There is no explicit constitutional provision authorizing the issuance of presidential signing statements. Article I of the Constitution provides only that the President “shall sign” a bill of which he approves, while in vetoing a measure the President is required to return the measure “with his Objections to that House in which it shall have originated.”<sup>4</sup> However, Presidents have issued such statements since the Monroe Administration, and there is little evident constitutional or legal support for the proposition that the President may be constrained from issuing a statement regarding a provision of law.

The first controversy arising in this context stemmed from a signing statement issued by Andrew Jackson in 1830 that raised objections to an appropriations bill that involved internal improvements.<sup>5</sup> The bill specifically addressed road examinations and surveys. In his signing statement President Jackson declared that the road in question, which was to reach from Detroit to Chicago, should not extend beyond the territory of Michigan.<sup>6</sup> A subsequently issued House Report criticized Jackson’s action, characterizing it as in effect constituting a line item veto.<sup>7</sup> Likewise, a signing statement issued by President Tyler in 1842 expressing doubts about the constitutionality of a bill regarding the apportionment of congressional districts was characterized by a select committee of the House as “a defacement of the public records and archives.”<sup>8</sup> Perhaps sensitized by this rebuke, Presidents Polk and Pierce apologized for the issuance of signing statements, noting that such action departed from the traditional practice of notifying Congress of the approval of a bill via an oral message from the President’s private secretary.<sup>9</sup> This conception of a signing statement as an unusual instrument was again noted by President Grant in 1875, when he declared that his use of a signing statement was an “unusual method of conveying the notice of approval....”<sup>10</sup>

Signing statements remained comparatively rare through the end of the 19<sup>th</sup> century, but had become common instruments by 1950. President Truman, for instance, issued nearly 16 signing statements per year, on average, with the figure steadily increasing up to the modern day. Concurrent with the rise in the number of statements issued, the usage of signing statements to voice constitutional objections

<sup>4</sup> U.S. Const., Art I, sec. 7 cl. 2; *see also*, May, n.2, *supra*, at 929.

<sup>5</sup> Louis Fisher, “Constitutional Conflicts Between Congress and the President,” University Press of Kansas, 4<sup>th</sup> Ed., at p.132 (1997).

<sup>6</sup> See Christopher S. Kelley, “A Comparative Look at the Constitutional Signing Statement,” 61<sup>st</sup> Annual Meeting of the Midwest Political Science Association, at p.5 (2003).

<sup>7</sup> Fisher, n.5, *supra*, at 132.

<sup>8</sup> Fisher, n.5, *supra*, at 133.

<sup>9</sup> May, n.2, *supra*, at 929-930.

<sup>10</sup> May, n.2, *supra*, at 930.

to acts of Congress has become increasingly prevalent over the past 60 years. This type of executive action began in earnest during the Reagan Administration, as one aspect of a comprehensive strategy employed by the Reagan Administration to aggressively assert the constitutional prerogatives of the presidency.<sup>11</sup>

### **A. Signing Statements in the Reagan Administration.**

President Reagan expanded the use and impact of the presidential signing statement, transforming it into a mechanism for the assertion of presidential authority and intent. President Reagan issued 276 signing statements, 71 of which (26%) contained provisions questioning the constitutionality of one or more of the statutory provisions signed into law.<sup>12</sup> One key aspect of President Reagan’s approach in this context centered on attempts to establish the signing statement as part of the legislative history of an enactment, and, concordantly, to persuade courts to take the statements into consideration in judicial rulings. This goal was illustrated in a memorandum drafted by Samuel A. Alito, Jr., then serving in the Office of Legal Counsel (OLC) of the Department of Justice, announcing a “primary objective” to “ensure that Presidential signing statements assume their rightful place in the interpretation of legislation.”<sup>13</sup> To this end, Attorney General Edwin Meese III entered into an agreement in 1986 with the West Publishing Company for signing statements to be included in the legislative histories contained in its U.S. Code Congressional and Administrative News publication.<sup>14</sup>

This strategy met with a degree of success in two major Supreme Court cases that were decided during this time period. In *INS v. Chadha*, which struck down as unconstitutional the congressional practice of subjecting various Executive Branch actions to a legislative veto, the Court noted that “11 Presidents, from Mr. Wilson through Mr. Reagan, who have been presented with this issue have gone on record at some point to challenge congressional vetoes as unconstitutional.”<sup>15</sup> Likewise, in *Bowsher v. Synar*, which struck down provisions of the Gramm-Rudman Deficit Reduction Act on the basis that they impermissibly imbued a legislative branch officer with executive authority, the Court noted: “[i]n his signing statement, the

<sup>11</sup> See, e.g., Morton Rosenberg, “Congress’s Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration’s Theory of the Unitary Executive,” 57 Geo. Wash. L. Rev. 627 (1989); CRS Report RL32855, *Presidential Review of Agency Rulemaking*, by T.J. Halstead (2005).

<sup>12</sup> The statistics cited in this paper for Presidents Reagan, George H.W. Bush and Clinton are derived from compilations by Christopher S. Kelly in “The Unitary Executive and the Presidential Signing Statement,” Appendix 3.1, p.192 (unpublished dissertation, Miami University, Oxford, Ohio (2003), copy on file with CRS). The statistics for President George W. Bush were compiled by CRS.

<sup>13</sup> Samuel A. Alito, Jr., “Using Presidential Signing Statements to Make Fuller Use of the President’s Constitutionally Assigned Role in the Process of Enacting Law” (February 5, 1986) (copy on file).

<sup>14</sup> Phillip J. Cooper, “By Order of the President: The Use and Abuse of Executive Direct Action,” University of Kansas Press, at p.203 (2002).

<sup>15</sup> 462 U.S. 919, 942 fn.13 (1983).

President expressed his view that the Act was constitutionally defective because of the Comptroller General's ability to exercise supervisory authority over the President.”<sup>16</sup> While these citations by the Court lend credence to validity of signing statements as constitutional presidential instruments, it does not appear that the statements were in fact relied upon in any determinative degree by the Court. Indeed, as discussed in further detail below, the contents of signing statements do not seem to have factored prominently in judicial decisions.<sup>17</sup>

One of the most significant conflicts involving a presidential signing statement in the Reagan Administration arose from the President’s statement accompanying the signing of the Deficit Reduction Act of 1984. In that statement, the President took issue with provisions of the bill constituting the Competition in Contracting Act, announcing his “vigorous objection to certain provisions that would unconstitutionally attempt to delegate to the Comptroller General...the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the executive branch.”<sup>18</sup> The President further stated that he was “instructing the Attorney General to inform all executive branch agencies as soon as possible with respect to how they may comply with the provisions of the bill in a manner consistent with the Constitution.”<sup>19</sup> President Reagan was specifically objecting to an automatic stay provision that prohibited the award of government contracts during any period where the Comptroller General was investigating complaints that an agency had not complied with the competitive bidding procedures required by the Act. Subsequent to this declaration, the Director of the Office of Management and Budget (OMB) issued OMB Bulletin 85-8, instructing federal agencies not to cooperate with GAO’s efforts to implement the Act.<sup>20</sup> Given that the actions taken by the relevant agencies pursuant to the specific instructions contained in the bulletin directly impacted contractors, the issue was ripe for judicial review. A judicial ruling issued in March of 1985 upheld the conferral of power at issue.<sup>21</sup> However, the Administration persisted in its refusals to give effect to the terms of the Act, acceding only in the face of additional rulings on the issue as well as a vote by the House Judiciary Committee to eliminate funds for the Office of the Attorney General from the budget.<sup>22</sup>

<sup>16</sup> 478 U.S. 714, 719 fn. 1(1986). See n. 57, *infra*, for a more detailed overview of the decision in *Bowsher v. Synar*.

<sup>17</sup> See n.88 and accompanying text, *infra*.

<sup>18</sup> P.L. 98-369, Deficit Reduction Act of 1984, Statement by President Ronald W. Reagan Upon Signing H.R. 4170, July 18, 1984.

<sup>19</sup> *Id.*

<sup>20</sup> Cooper, n.14, *supra*, at 226.

<sup>21</sup> *Ameron, Inc. v. U.S. Army Corps of Engineers*, 607 F.Supp. 962 (D.N.J. 1985).

<sup>22</sup> Cooper, n.14, *supra*, at 226-27.

## B. Signing Statements in the George H.W. Bush Administration.

The Administration of President George H.W. Bush (Bush I) continued to employ signing statements to further presidential prerogatives, issuing 214 signing statements, 146 of which (68%) raised constitutional objections. In particular, the Bush I Administration was highly sensitive to perceived encroachments upon executive power by Congress, as illustrated by an OLC opinion drafted by Deputy Attorney General William P. Barr. In this memo, Barr identified ten categories of legislative action he considered constitutionally problematic and noted that the Administration had objected to many of these perceived intrusions through the issuance of signing statements.<sup>23</sup>

One category that was consistently acted upon by the Bush I Administration was protection of presidential authority under the Appointments Clause of the Constitution. For example, upon signing the National and Community Services Act of 1990 into law, President Bush issued a statement declaring that provisions in the bill establishing a Board of Directors charged with administering a National and Community Services Act Commission were unconstitutional due to the requirement that certain appointees were to be drawn from a pool of nominees forwarded by the Speaker of the House of Representatives and the Majority Leader of the Senate. President Bush specifically noted that such a requirement exceeded the authority of Congress in the appointment context and declared that he would treat the requirement as being “without legal force or effect.” The President further directed the Attorney General “to prepare remedial legislation for submission to the Congress during its next session, so that the Act can be brought into compliance with the Constitution’s requirements.” Congress subsequently passed a bill remedying the constitutionally challenged provisions. Additionally, upon signing the Dayton Heritage Preservation Act of 1992 into law, President Bush issued a statement objecting to language in the bill that directed the Secretary of Interior to make appointments of individuals to a Heritage Commission based on the recommendations of local officials, stating that since “[t]he majority of members are effectively selected by various nonfederal officials and thus are not appointed in conformity with the Appointments Clause of the Constitution,” he was signing the bill “on the understanding that the commission will serve only in an advisory capacity and will not exercise Government power.” The Bush I Administration subsequently refused to make any appointments to the Commission until this concern was addressed in remedial legislative action in 1995.<sup>24</sup> The Bush I Administration also continued to pursue a strategy of employing signing statements to influence the interpretation of the legislative history accompanying a bill. However, as in the Reagan Administration, it is not apparent that these efforts were successful.

## C. Signing Statements in the Clinton Administration.

While the policy aims of his Administration might have differed, President Clinton’s conception of executive power revealed itself to be largely consonant with

<sup>23</sup> Department of Justice, Office of Legal Counsel, “Common Legislative Encroachments on Executive Branch Authority,” 13 U.S. Op. Off. Legal Counsel, 248, 249 (1989).

<sup>24</sup> Kelley, n.6, *supra*, at 11.

the philosophical underpinnings of the Reagan and Bush I Administrations.<sup>25</sup> Accordingly, President Clinton also made active use of signing statements as a mechanism to assert presidential prerogatives. President Clinton issued 391 signing statements, 105 of which (27%) raised constitutional concerns or objections.

President Clinton also relied upon the Office of Legal Counsel of the Department of Justice to produce memoranda not only in support of the issuance of signing statements generally, but also asserting presidential authority to refuse to enforce unconstitutional statutes. Regarding the former, then Assistant Attorney General Walter Dellinger prepared an OLC memorandum asserting that the issuance of signing statements to “make substantive legal, constitutional or administrative pronouncements,” was well established, and that these uses “generally serve legitimate and defensible purposes.”<sup>26</sup> In a subsequent memorandum, Assistant Attorney General Dellinger declared that “there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional.”<sup>27</sup> In support of this “general proposition” that Mr. Dellinger “believe[d] to be uncontroversial,” the memorandum pointed to what he argued was “significant judicial approval,” and “consistent and substantial executive practice.”<sup>28</sup>

It is important to note that while the Dellinger memorandum asserted that the President has an “enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional power of the Presidency,” the memo nonetheless acknowledged that the “Supreme Court plays a special role in resolving disputes about the constitutionality of enactments.” Accordingly, the memorandum advised:

As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue. If, however, the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.”<sup>29</sup>

The memorandum went on to advise that in deciding whether to refuse to enforce a provision of law, the President should weigh “the effect of compliance with the provision on the constitutional rights of affected individuals and on the executive branch’s constitutional authority,” with a focus on the likelihood of whether that

<sup>25</sup> See, e.g., CRS Report RL32855, *Presidential Review of Agency Rulemaking*, by T.J. Halstead (2005).

<sup>26</sup> Department of Justice, Office of Legal Counsel, “The Legal Significance of Presidential Signing Statements,” 17 U.S. Op. Off. Legal Counsel 131, (1993). While the memorandum defended the use of signing statements to announce that an Administration would not give effect to a congressional enactment, it went on to note that “the recent practice of issuing signing statements to create ‘legislative history’ remains controversial....”

<sup>27</sup> Department of Justice, Office of Legal Counsel, “Presidential Authority to Decline to Execute Unconstitutional Statutes,” 18 U.S. Op. Off. Legal Counsel, 199 (1994).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 200.

compliance or non-compliance would permit judicial resolution of the issue.<sup>30</sup> While this recommendation appears to be based on a determination that it would be more appropriate to limit a refusal to enforce a law to situations that “would afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch,” the memorandum nonetheless declared that some encroachments would not be justiciable, and that in such instances the President “must shoulder the responsibility of protecting the constitutional role of the presidency.”<sup>31</sup>

In light of this conception of presidential power, it is not surprising that the Clinton signing statements often contained broad constitutional pronouncements similar to those of the Reagan and Bush I Administrations, ranging from the foreign affairs power to the Recommendation Clause. Regarding the latter, in a signing statement accompanying the Balanced Budget Act of 1997, President Clinton took objection to a provision requiring the Secretary of Health and Human Services to develop certain legislative proposals, declaring that he would “construe this provision in light of my constitutional duty and authority to recommend to the Congress such legislative measures as I judge necessary and expedient, and to supervise and guide my subordinates, including the review of their proposed communications to Congress.”<sup>32</sup> Like his predecessor, President Clinton also guarded presidential appointment prerogatives, objecting to provisions he perceived as impinging upon executive authority in that context. For example, in a statement issued along with the enactment of the Coast Guard Authorization Act of 1997, President Clinton likewise objected to a provision of the bill that purported to require the designation of certain commission members exercising executive power from persons recommended by local officials or organizations. President Clinton declared that “[t]he Appointments Clause does not permit such restrictions to be imposed upon the executive branch’s powers of appointment. Therefore I will not interpret [this provision] of the Act as binding, and I direct the Secretary of Transportation to regard the designations and recommendations arising from it as advisory only.”<sup>33</sup>

While signing statements that raise constitutional objections or signal an intention to refuse to enforce a provision in law are usually generalized in nature, President Clinton’s statement accompanying the National Defense Authorization Act for Fiscal Year 2000 provides a stark example of a substantive presidential directive being included within a statement itself. The Act established the National Nuclear Security Administration (NNSA), a new, semi-autonomous agency within the Department of Energy to manage and oversee the operational and security activities of the Department’s nuclear weapons laboratories.

In his signing statement, the President expressed misgivings with respect to structural arrangements within the new agency and the limitations on the Secretary

<sup>30</sup> *Id.* at 201.

<sup>31</sup> *Id.* at 201.

<sup>32</sup> See Curtis A. Bradley and Eric A. Posner, “Presidential Signing Statements and Executive Power,” University of Chicago, Public Law and Legal theory Working Paper No. 133, at p.15 (July, 2006).

<sup>33</sup> *Id.*

of Energy's ability to direct and control the activities and personnel of the NNSA, but did not suggest that the legislation raised constitutional issues. In particular, the President objected to what he saw as the isolation of the personnel and contractors of the NNSA from direction by Department officials outside the new agency; the limitation on the Secretary's ability to employ his statutory authorities to direct the activities and personnel of the NNSA both personally and through designated subordinates; the uncertainty whether the Department's duty to comply with the procedural and substantive requirements of environmental laws would be fulfilled under the new arrangement; the removal of the Secretary's direct authority over certain sensitive classified programs; and the potentially deleterious effect of the creation of redundant support functions in the areas of procurement, personnel, public affairs, legal affairs, and counterintelligence. To ensure that these perceived deficiencies do not, in his view, undermine the Secretary's statutory responsibilities in the area, the President directed the Secretary to assume the duties and functions of the new office of Under Secretary for Nuclear Security and to "guide and direct" all NNSA personnel by using his authority, "to the extent permitted by law," to assign any Departmental officer or employee to a concurrent office within NNSA. The Secretary is also directed to "mitigate" the risks to the chain of command between him and subordinate agency personnel presented by the legislation's redundant functions "to the extent permissible under law." The President indicated that he might not submit a nominee for Under Secretary for Nuclear Security until action was taken by Congress to remedy the identified deficiencies and to "harmonize" the Secretary's authorities with those vested in the Under Secretary.

Whereas the statement issued by President Reagan in response to the Competition in Contracting Act was typical of presidential signing statements in that it contained a generalized constitutional objection to a provision in a bill, followed by subsequent particularized and substantive presidential action, President Clinton's NNSA statement was uncharacteristically direct, laying out the specific actions that were to be taken in order to ensure the vitiation of the provisions President Clinton deemed objectionable. As noted by Professor Philip J. Cooper, this statement did not simply raise a generalized constitutional objection or signal an intent to refuse to enforce the provisions at issue, but, rather, constituted an "order to do that which the Congress had expressly rejected."<sup>34</sup>

#### **D. Signing Statements in the George W. Bush Administration.**

Like its predecessors, the Administration of George W. Bush (Bush II) has employed the signing statement to voice constitutional objections to, or concerns with, congressional enactments, or to enunciate the Administrations interpretation of an enactment it deems ambiguous. However, while the nature and scope of the objections raised by the Bush II Administration mirror those of prior Administrations, the sheer number of challenges contained in the signing statements issued by President Bush indicate that the current Administration is using this presidential instrument relative to all levels and elements of the Executive Branch and to aggressively assert presidential prerogatives in its relations with the Congress

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<sup>34</sup> Cooper, n.14, *supra*, at 228.

and the Judiciary. These factors, in turn, have generated a significant degree of controversy regarding the issuance of presidential signing statements.

At first glance, it does not appear that President Bush has departed significantly from prior practice in the signing statement context, having issued 128 signing statements as compared to 391 during the Clinton Administration. However, the qualitative difference in the Bush II approach becomes apparent when considering the number of individual challenges or objections to statutory provisions that are contained in these statements. Of President Bush's 128 signing statements, 110 (86%) contain some type of constitutional challenge or objection, as compared to 105 (27%) during the Clinton Administration. Even more significant, however, is the fact that these 108 signing statements are typified by multiple constitutional and statutory objections, containing challenges to over 700 distinct provisions of law.<sup>35</sup>

Contributing to the controversy has been the high profile of several of the provisions that have been objected to by President Bush. For instance, in the signing statement accompanying the USA Patriot Improvement and Reauthorization Act of 2005, President Bush declared that provisions requiring the Executive Branch to submit reports and audits to Congress would be construed "in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties."<sup>36</sup> Likewise, in the signing statement accompanying the law that contained the McCain Amendment (as part of the Detainee Treatment Act) prohibiting the use of torture, or cruel, inhuman, or degrading treatment of prisoners, the President declared that the Executive Branch would construe that provision "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief...[in order to protect] the American people from further terrorist attacks."<sup>37</sup>

While the number of provisions challenged or objected to by President Bush has given rise to controversy, it is important to note that the substance of his signing statements do not appear to differ substantively from those issued by either Presidents Reagan or Clinton. As with those Administrations, The majority of the Bush II signing statements make generalized objections to perceived encroachments on executive authority.<sup>38</sup> Moreover, in almost all instances where President Bush has raised a constitutional concern or objection, he has stated that he will construe the

<sup>35</sup> See, Charlie Savage, "Bush Challenges Hundreds of Laws; President Cites Powers of His Office," Boston Globe, April 30, 2006.

<sup>36</sup> P.L. 109-177, USA PATRIOT Improvement and Reauthorization Act of 2005, statement of President George W. Bush Upon Signing H.R. 3199, March 9, 2006.

<sup>37</sup> P.L. 109-148, Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, Statement of President George W. Bush Upon Signing of H.R. 2863, Dec. 30, 2005.

<sup>38</sup> Bradley and Cooper, n.32, *supra*, at 8.

provision at issue in a manner that will avoid his concerns.<sup>39</sup> Relatedly, in some statements that raise constitutional objections, President Bush has declared that he would comply with the provision at issue “as a matter of comity.”<sup>40</sup>

Professor Philip J. Cooper has characterized the constitutional objections raised by President Bush as falling across seventeen categories, ranging from generalized assertions of presidential authority to supervise the “unitary executive branch”<sup>41</sup> to federalism limits imposed by the Supreme Court in *United States v. Printz*.<sup>42</sup> The Bush II Administration has been particularly prolific in issuing signing statements that object to provisions that it claims infringe on the President’s power over foreign affairs (oftentimes with regard to requirements that the Administration take a particular position in negotiations with foreign powers); provisions that require the submission of proposals or recommendations to Congress<sup>43</sup> (asserting that they interfere with the President’s authority under the Recommendations Clause to “recommend such Measures as he shall judge necessary and expedient); provisions imposing disclosure or reporting requirements (on the ground that such provisions may interfere with the President’s authority to withhold sensitive or privileged information); conditions and qualifications on executive appointments (asserting infringement on the President’s authority pursuant to the Appointments Clause); and legislative veto provisions (on the ground that they violate bicameralism and presentment requirements as established in *INS v. Chadha*).

While the substance of the Bush II signing statements appear to be comparable to those of previous administrations, the nature and sheer number of provisions challenged or objected to indicates that there is nonetheless a qualitative difference to the current Administration’s use of this instrument. As has been widely noted, President Bush has “emphatically endorsed the unitariness of the executive branch,”<sup>44</sup> and has taken steps to assert sole presidential authority over its administration. In addition to actions taken to prosecute the War on Terror, President Bush has exercised significant control over the agency rulemaking process,<sup>45</sup> and has issued executive orders claiming authority to control the release of presidential records and to classify and reclassify information that implicates national security concerns.<sup>46</sup> The Bush II Administration has also exercised significant control over the release of information relating to internal Executive Branch deliberations, as in the Vice President’s refusal to disclose information regarding the activities of the National

<sup>39</sup> *Id.* at 9.

<sup>40</sup> *Id.* at 10.

<sup>41</sup> *Id.* at 9.

<sup>42</sup> Cooper, n.1, *supra*, at 522.

<sup>43</sup> Bradley and Cooper, n.32, *supra*, at 8.

<sup>44</sup> Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, “The Unitary Executive in the Modern Era,” 90 Iowa L. Rev. 601, 722 (2005).

<sup>45</sup> Halstead, n.25, *supra*.

<sup>46</sup> See E.O. 13233 (Nov. 1, 2001); E.O. 13292 (March 25, 2003).

Energy Policy Development Group to the Government Accountability Office (leading to the litigation in *Walker v. Cheney*).<sup>47</sup>

When viewed through the prism of the Administration's actions in these contexts, it seems evident that the Bush II signing statements are an integral part of the Administration's efforts to further its broad view of presidential prerogatives and to assert functional and determinative control over all elements of the executive decisionmaking process. Furthermore, the dramatic increase in the number of provisions challenged by and objected to by President Bush has been widely seen as being aimed at altering the conception of presidential authority not only in the internal operations of the Executive Branch, but with respect to Congress, the courts and the public.

As touched upon above, the large bulk of the signing statements the Bush II Administration has issued to date do not apply particularized constitutional rationales to specific scenarios, nor do they contain explicit, measurable refusals to enforce a law. Instead, the statements make broad and largely hortatory assertions of executive authority that make it effectively impossible to ascertain what factors, if any, might lead to substantive constitutional or interpretive conflict in the implementation of an act. The often vague nature of these constitutional challenges, coupled with the pervasive manner in which they have been raised in numerous signing statements could thus be interpreted as an attempt by the Administration to systematically object to any perceived congressional encroachment, however slight, with the aim of inuring the other branches of government and the public to the validity of such objections and the attendant conception of presidential authority that will presumably follow from sustained exposure and acquiescence to such claims of power.

The current Administration's expansive assertion of its prerogatives through the use of signing statements has generated a significant degree of controversy, leading some to call for the enactment of a bar to their issuance, or for the conferral upon Congress of the right to challenge statements in court.<sup>48</sup> However, an analysis of the underlying legal and constitutional issues suggests that such approaches misapprehend the nature of signing statements generally, as well as the nature of the pragmatic and institutional concerns that are posed by the attempts at assertion of executive power underlying the controversy over these instruments.

## **Legal and Constitutional Implications of Signing Statements**

As has been illustrated, there is a long history of presidential issuance of signing statements, and these statements provide "one way in which a President may indicate his intent to refuse to enforce a provision of a congressionally enacted law that he

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<sup>47</sup> See CRS Report RL31397, *Walker v. Cheney: District Court Decision and Related Statutory and Constitutional Issues*, by T.J. Halstead (2004).

<sup>48</sup> ABA Task Force Report, n.3, *supra*; United States Senate, Committee on the Judiciary, Statement of Bruce Fein on Presidential Signing Statements, June 27, 2006.

believes to be unconstitutional.”<sup>49</sup> However, there is little evident support for the notion that objections or concerns raised in a signing statement may be given substantive legal effect. As one commentator has suggested:

Where the President has played a major role in drafting or supporting a particular statutory provision, presidential statements should be granted interpretive significance.... When the President opposed the provision being interpreted, however, his signing statements ... lack persuasive authority.<sup>50</sup>

This observation is buttressed by the analysis of the district court in *Dacosta v. Nixon*, which stated that a bill, when passed by Congress and approved by the President, “establishe[s] ‘the policy of the United States’ to the exclusion of any different executive or administrative policy, and ha[s] binding force and effect on every officer of the Government, no matter what their private judgments of that policy, and illegalize[s] the pursuit of an inconsistent executive or administration policy. No executive statement denying efficacy to legislation could have either validity or effect.”<sup>51</sup> Irrespective of this maxim, presidents have repeatedly declared their intention to disregard laws that they view as unconstitutional.<sup>52</sup>

This persistent practice on the part of presidents gives rise to the question of whether a President can refuse to comply with a law he believes to be unconstitutional. The Supreme Court has not directly addressed this issue, but a long line of precedent could be taken to indicate a consistent view on the part of the Court that the Take Care Clause<sup>53</sup> imposes a duty on the President to ensure that officials obey Congress’s instructions, and, conversely, that the Clause does not imbue the President with the authority to dispense with congressional enactments. In *Kendall v. United States ex rel Stokes*, for instance, the Court declared that where Congress has imposed upon an executive officer a valid duty, “the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.”<sup>54</sup> Underlying the Court’s rejection of the government’s argument that the Take Care Clause carried with it the power to control executive officials was the desire to avoid “clothing the President with a power entirely to control the legislation of Congress...To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction

<sup>49</sup> Christine E. Burgess, Note, “When May a President Refuse to Enforce the Law?”, 72 Tex. L. Rev. 631, 641 (1994).

<sup>50</sup> Frank B. Cross, “The Constitutional Legitimacy and Significance of Presidential ‘Signing Statements,’” 40 Admin.L.Rev. 209 (1988).

<sup>51</sup> 55 F.R.D. 145, 146 (E.D.N.Y. 1972).

<sup>52</sup> See Christopher N. May, “Presidential Defiance of ‘Unconstitutional’ Laws: Reviving the Royal Prerogative,” Contributions in Legal Studies, No. 86 (1998).

<sup>53</sup> The Take Care Clause states that the President “shall take Care that the Laws be faithfully executed.” U.S. Const. Art. II, sec. 3, cl. 3.

<sup>54</sup> 12 Pet. (37 U.S.) 524, 610 (1838).

of the Constitution, and entirely inadmissible.”<sup>55</sup> Since *Kendall*, the Court has consistently rejected the assertion that the Clause is a substantive grant of power to the President. In *Myers v. United States*, for instance, the Court declared that “[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.”<sup>56</sup> Likewise, in *Youngstown Sheet & Tube Co. v. Sawyer*, the Court declared that “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.”<sup>57</sup>

Despite these declarations from the Court, the Executive Branch has consistently maintained that the President possesses authority to decline to enforce enactments he views as unconstitutional.<sup>58</sup> As enunciated in the Dellinger Memo,<sup>59</sup> the Department of Justice (DOJ) has pointed to the Court’s decision in *Myers v. United States*, for support for this proposition, asserting that since “the Court sustained the President’s view that the statute at issue was unconstitutional without any member of the Court suggesting that the President had acted improperly in refusing to abide by the statute,” the Court could therefore “be seen to have implicitly vindicated the view that the President may refuse to comply with a statute that limits his constitutional powers if he believes it to be unconstitutional.”<sup>60</sup> Additionally, the Dellinger Memo pointed to Justice Jackson’s concurrence in *Youngstown* as recognizing the existence of the “President’s authority to act contrary to a statutory command,” and has likewise cited Justice Scalia’s concurrence in *Freytag v. Commissioner*, for the proposition that “the President has the ‘power to veto encroaching laws ...or even to disregard them when they are unconstitutional.’”<sup>61</sup>

It is not at all clear that the reliance of the DOJ on these factors would bear the weight of direct judicial scrutiny. Specifically, as noted above, the Court in *Myers v. United States* evidenced a clear appreciation of the limits of the President’s authority under the Take Care Clause. As such, there would appear to be little support for the DOJ’s conclusion that *Myers* implicitly validated the notion that the President may refuse to enforce laws he deems unconstitutional, particularly in light of the fact that the Court in *Myers* did not address the President’s refusal to enforce the law at issue. As was stated by the Court in *Powell v. McCormack*, “[t]hat an unconstitutional

<sup>55</sup> *Id.* at 610.

<sup>56</sup> 272 U.S. 52, 177 (1926).

<sup>57</sup> 343 U.S. 579, 587 (1952).

<sup>58</sup> See Walter Dellinger, “Presidential Authority to Decline to Execute Unconstitutional Statutes,” Office of Legal Counsel, 18 U.S. Op. Off. Legal Counsel 199 (Nov. 2, 1994) (“[o]pinions dating to at least 1860 assert the President’s authority to decline to effectuate enactments that the President views as unconstitutional”).

<sup>59</sup> See n.27 and accompanying text, *supra*.

<sup>60</sup> *Id.* at 199, 201-202.

<sup>61</sup> *Id.* at 199 (quoting *Freytag v. Commissioner*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring)).

action has been taken before surely does not render that same action any less unconstitutional at a later date.”<sup>62</sup> It is also difficult to see how Justice Jackson’s concurrence in *Youngstown* can be cited as dispositive of the issue. First, while the concurrence contemplates the allocation of power between Congress and the executive in the event that the “President takes measures incompatible with the express or implied will of Congress,” it, like the majority opinion in *Myers*, does not give any substantive consideration whatsoever to the President’s authority to decline to enforce the law.<sup>63</sup> Second, the DOJ opinion does not address the holding of the majority in *Youngstown* that the “Constitution limits [the President’s] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.”<sup>64</sup> Likewise, Justice Scalia’s concurrence in *Freytag*, while probative, does not provide any substantive analysis in support of this proposition, and arose in a case that did not involve executive refusal to comply with the law.

While the Court has not had occasion to address the issue directly, the cases discussed above could be taken to indicate a rejection on the part of the Court that the President possesses the power to suspend acts of Congress, instead establishing that the President is bound to give effect to such enactments pursuant to the Take Care Clause. The natural corollary of this proposition, as touched upon by the Court in *Youngstown*, is that the proper course of action for the President, when faced with a bill he deems unconstitutional, is to exercise his Article I veto authority.<sup>65</sup> However, as is evidenced by the DOJ opinion discussed above, there are competing viewpoints on this issue. As such it is not possible to state conclusively that the President lacks any authority whatsoever to decline to enforce laws he deems unconstitutional absent a definitive consideration of the issue by the Court.

## **Substantiality of Constitutional Objections**

While presidential authority to refuse to enforce laws he considers unconstitutional is a matter of significant constitutional importance, the issue is ultimately of little concern with regard to the legality or effect of signing statements themselves. As the judicial maxims discussed above establish, there is little evident support for the notion that signing statements are instruments with legal force and effect in and of themselves. If an action taken by a President in fact contravenes legal or constitutional provisions, that illegality is not augmented or assuaged merely by the issuance of a signing statement. Commentators argue that this dynamic lends credence to the notion that signing statements have been employed by the Bush II Administration not to flatly reject congressional enactments, but, rather, are intended to sensitize other parties to the President’s conception of executive authority. Moreover, the usage of signing statements as an instrument to expand executive authority generally, as opposed to a mechanism by which the President has claimed

<sup>62</sup> 395 U.S. 486, 547 (1969).

<sup>63</sup> 343 U.S. at 637.

<sup>64</sup> 272 U.S. at 177.

<sup>65</sup> See *INS v. Chadha*, 462 U.S. 919, 945 (1983) (“Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process.”).

summary authority to dispense with the laws enacted by Congress, becomes more apparent when the merits of the objections that typify signing statements are examined. In particular, such analysis indicates that while there are instances in which signing statements are predicated on specific and supportable concerns, the majority of the objections raised for example in President Bush's signing statements are largely unsubstantive or are so general as to appear to be hortatory assertions of executive authority.

### **Foreign Affairs Power and Executive Privilege.**

As noted above, foreign affairs legislation has been one of the primary areas in which President Bush has repeatedly raised constitutional objections or challenges. For example, remarking upon provisions of the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003 that required the imposition of sanctions against Syria absent a presidential determination and certification that certain conditions had been met by Syria or a determination that national security concerns justified a waiver of sanctions, the President Bush declared:

A law cannot burden or infringe the President's exercise of a core constitutional power by attaching conditions precedent to the use of that power. The executive branch shall construe and implement [this requirement] in a manner consistent with the President's constitutional authority to conduct the Nation's foreign affairs and as Commander in Chief, in particular with respect to the conduct of foreign diplomats in the United States, the conduct of United States diplomats abroad, and the exportation of items and provision of services necessary to the performance of official functions by United States Government personnel abroad.

Additionally, remarking upon provisions that required the Secretary of State to submit reports regarding Syria's compliance with the conditions of the Act and that nations dealings with terrorists, the President declared:

The executive branch shall construe [this requirement] in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.

This signing statement is typical of the Bush II Administration's approach, in that it challenges more than one provision of the bill and voices objection across a range of constitutional principles. While the broad and generalized nature of the President's remarks make it difficult to determine specific objections that might arise in the implementation of the Act, it may be assumed that President Bush determined that the requirements imposed by Congress under these portions of the Act raised separation of powers concerns to the extent that they could be construed as impinging upon core presidential powers or impairing the President's ability to protect national security information or deliberations with his advisors.

Regarding the concerns voiced over the executive's foreign affair prerogatives, it should be noted that the Supreme Court has proscribed legislative attempts to extend congressional power into what could be called the "core functions" of the

Executive Branch.<sup>66</sup> However, the President's citation of this maxim in his signing statement could be seen as a hortatory assertion of broad executive authority regarding the conduct of foreign affairs that does not acknowledge the substantial authority that is likewise possessed by Congress in this context. Specifically, while it is generally conceded that there are some powers enjoyed by the President alone regarding foreign affairs,<sup>67</sup> it is likewise evident that Congress possesses wide authority to promulgate policies respecting foreign affairs.<sup>68</sup> Congress has often exercised this authority to determine policy objectives for the United States in international negotiations and to require subsequent legislative approval of international agreements before they may enter into force for the United States.<sup>69</sup>

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<sup>66</sup> In *Bowsher v. Synar*, 478 U.S. 714 (1986), for instance, the Court interpreted the Separation of Powers doctrine as it applied to the Gramm-Rudman Deficit Reduction Act. Under the Act, the Comptroller General was empowered to review deficit estimates from the Office of Management and Budget and the Congressional Budget Office, and to mandate spending reductions to meet a specified deficit level. This report by the Comptroller General would then be forwarded to the President who was required to issue an order enforcing the spending reductions. The order would become effective unless Congress passed legislation which reduced spending to meet deficit estimates. Furthermore, the Comptroller General could only be removed by Congress, via a joint resolution. *Id.* at 728. The Supreme Court found that the Act imbued the Comptroller General, an official appointed by the President, but removable by Congress, with the power to interpret provisions of the Act, and to dictate the means by which the Executive Branch implemented budget reduction measures. *Id.* at 728. Accordingly, the Court determined that the Comptroller General, a legislative branch officer, was, in essence, performing the functions of an executive officer in executing a law passed by Congress, a duty constitutionally committed to an officer of the Executive Branch. *Id.* at 733. This dynamic rendered the Act unconstitutional, as the Court explained, because of the maxim that "once Congress makes its choice in enacting legislation, its participation ends." *Id.* at 733. Subsequent to enactment, Congress may "control the execution of its enactment only indirectly...by passing new legislation." *Id.* at 734. The Court determined that by placing the authority to implement the Act in an officer subject only to congressional removal, Congress in effect "retained control over the execution of the Act" and unconstitutionally "intruded into the executive function." *Id.* at 734. See also, *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995) (striking down legislative assumption of judicial power).

<sup>67</sup> The President's fundamental authority to decide whether or not to recognize foreign states or governments and to maintain diplomatic relations with them, "is implied in the President's express constitutional power to appoint Ambassadors...and to receive Ambassadors...and his implied power to conduct the foreign relations of the United States." American Law Institute, Restatement (Third) of the Foreign Relations of the United States," §204, Comment A (1987).

<sup>68</sup> Congress, in which is vested "[a]ll legislative powers," Article I, §1, is authorized to tax and spend "to...provide for the common Defence," *id.* §8 cl. 1, "[t]o regulate Commerce with foreign Nations," *id.*, §8 cl. 3, and to make all laws that are necessary and proper to execute the foregoing powers as well as all other powers vested by the Constitution in the U.S. Government or in any government department or officer. *Id.*, §8 cl. 18.

<sup>69</sup> American Law Institute, Restatement (Third) of the Foreign Relations of the United States," (1987), at §303(2) ("the President, with the authorization or approval of Congress, may make an international agreement dealing with any matter that falls within the powers of Congress and of the President under the Constitution."). See also, Congressional  
(continued...)

Accordingly, while there may be valid constitutional concerns regarding certain provisions of the Act regarding the setting of conditions for sanctions, the President's signing statement does not raise any specific objections thereto. Instead, the statement makes a generalized assertion regarding presidential authority over foreign affairs that appears to be of little substantive weight in light of the dispersed allocation of power between the political branches in this context.

The President's statement that the Executive Branch will construe provisions of the Act requiring the submission of information to Congress "in a manner consistent with the President's constitutional authority to withhold information," would also appear to constitute a generalized declaration of executive power, given that it likewise does not raise any specific objection to the provision, or provide any substantive analysis of how its requirements might impinge upon executive authority. To the extent that this portion of the signing statement might be taken to indicate a position on the part of the executive that it possesses an absolute right to withhold documents from Congress, it should be noted that judicial and historical precedents run to the contrary. Regarding the duties imposed on the Secretary of State under the Act, it is well established that Congress may impose reporting requirements upon Executive Branch officials,<sup>70</sup> and nothing in the Act purports to strip the President of his authority to assert a valid claim of privilege, or to withhold documents on the basis of national security. Regarding claims of privilege with regard to presidential communications, the Court held in *United States v. Nixon* that the notion of privilege is constitutionally rooted, and that when invoked by the President, the materials at issue are deemed "presumptively privileged."<sup>71</sup> However, the Court further held that the privilege is qualified, not absolute, and may be overcome by an adequate showing of need.<sup>72</sup>

The Court in *Nixon* indicated that the President's authority to "protect military, diplomatic or sensitive national security secrets," was significantly greater than his power to protect the confidentiality of executive communications.<sup>73</sup> This statement by the Court was consistent with previous decisions recognizing presidential authority with regard to military and diplomatic matters. In *C.&S. Airlines v. Waterman Corp.*, for instance, the Court stated that it would be "intolerable that courts, without the relevant information, should review and perhaps nullify actions

<sup>69</sup> (...continued)

Research Service, "Treaties and Other International Agreements: The Role of the United States Senate; A Study Prepared for the Senate Committee on Foreign Relations," 78-86 (January 2001) (S.R. 106-710).

<sup>70</sup> See Walter Dellinger, Assistant Att'y Gen., Memorandum for the General Counsels of the Federal Government, "The Constitutional Separation of Powers between the President and Congress," at 54-56 (May 7, 1996) (available at 1996 WL 876050).

<sup>71</sup> *United States v. Nixon*, 418 U.S. 683, 705 (1974). For a thorough overview of the executive privilege issues, see CRS Report RL30319, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments*, by Morton Rosenberg.

<sup>72</sup> *Id.* at 705, 706, 708.

<sup>73</sup> *Id.* at 706.

of the Executive taken on information properly held secret.”<sup>74</sup> It is important to note, however, that principles governing judicial deference to the executive in this context do not apply to access by Congress. In *United States v. American Telephone and Telegraph Co.*, the Court of Appeals for the District of Columbia rejected the argument that “the Constitution confers on the executive absolute discretion in the area of national security.”<sup>75</sup> In support of this holding, the court explained:

While the Constitution assigns to the President a number of powers relating to national security, including the function of commander in chief and the power to make treaties and appoint Ambassadors, it confers upon Congress other powers equally inseparable from the national security, such as the powers to declare war, raise and support armed forces and, in the case of the Senate, consent to treaties and the appointment of ambassadors.<sup>76</sup>

While acknowledging the powers conferred upon both branches in this context, it is important to note that the court in *AT&T* rejected the notion that disputes over such information were “‘political questions’ beyond the jurisdiction or proper role of [a] court.”<sup>77</sup> Rather, the court left open the possibility that disputes over information pertaining to national security could be resolved by the judiciary in the event that Congress and the executive could not reach a compromise on a given issue.<sup>78</sup> Thus, while the aforementioned cases establish that the President has inherent constitutional authority to protect the confidentiality of executive communications and national security information, it is likewise apparent that these powers are not absolute, with Congress possessing concordant authority to investigate and inquire into such matters. Accordingly, it seems apparent that the President’s generalized concerns regarding to the requirements of the Act are not buttressed by any underlying definitive right to withhold information from Congress.

These constitutional and legal principles are applicable to almost every other signing statement that raises constitutional objections or challenges to congressional enactments in foreign affairs or executive privilege contexts, in that the general assertions of authority discussed above are the norm in these statements. This signing statement is also typical of the Bush II Administration’s approach, given that there is no indication that President Bush has in fact refused to follow any of the provisions of the Act at issue. In fact, President Bush has issued an executive order that both implements sanctions as prescribed in the Act and acknowledges the reporting requirements imposed by the Secretary of State, without objection.

### **Direct Reporting Requirements.**

As noted in the ABA Report, President Bush has also employed the signing statement to object to direct reporting requirements that have been imposed by

<sup>74</sup> 333 U.S. 103, 111 (1948).

<sup>75</sup> 567 F.2d 121, 128 (D.C. Cir. 1977).

<sup>76</sup> *Id.* at 128.

<sup>77</sup> *Id.* at 126 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

<sup>78</sup> *Id.* at 127.

Congress.<sup>79</sup> However, these signing statements are likewise generally unsupported by established legal principles governing Congress' authority to compel and receive information directly from Executive Branch agencies. Congress has imposed direct reporting requirements on Executive Branch officials since the first Congress. Legislation establishing the Treasury Department required the Secretary to report to Congress and to "perform all such services relative to the finances, as he shall be directed to perform."<sup>80</sup> Alexander Hamilton, serving as the first Secretary of the Treasury, submitted reports to the House of Representatives pursuant to this command, and began each report with an acknowledgment of the order of the house that had directed him to report.<sup>81</sup> Furthermore, prior to the establishment of the President's authority over the Executive Branch budget process in the Budget and Accounting Act of 1921,<sup>82</sup> each agency submitted its annual budget request directly to Congress.<sup>83</sup> Finally, the Supreme Court has long recognized the validity of reporting requirements,<sup>84</sup> and in *INS v. Chadha*,<sup>85</sup> the Court explicitly affirmed Congress' authority to impose "report and wait" provisions, distinguishing them from the unconstitutional legislative veto provisions under review in that case. In light of these factors, it seems apparent that signing statements objecting to direct reporting requirements represent an attempt to sensitize executive personnel to the wishes of the President and to assert a broad conception of presidential power in the face of congressional enactments, rather than a definite and substantive refusal to enforce a congressional enactment.

### **Legislative Veto Provisions.**

President Bush has also been quite active in issuing signing statements that object to bills passed by Congress that impose a legislative veto over actions taken by the Executive Branch. Presidential action in this context is particularly interesting, as it provides an example of a context in which the Presidents' declarations are on solid constitutional footing, as well as the opportunity to analyze two conceptually related arguments that have been raised against the issuance of signing statements generally.

As noted above, the Supreme Court's holding in *INS v. Chadha* invalidated the use of a legislative veto by Congress by virtue of the Court's determination that such

<sup>79</sup> ABA Task Force Report, n.3, *supra*, at 16.

<sup>80</sup> Act of Sept. 2, 1789, Ch. 12, §2, 1 Stat. 65, 66.

<sup>81</sup> See, e.g., 2 Annals of Cong. 1991 (1790) (report on Public Credit); *id.* at 2031 (Report on a National Bank); 3 Annals of Cong. 971 (1791) (Report on Manufactures) (noting that "[t]he Secretary of the Treasury, in obedience to the order of the House of Representatives...").

<sup>82</sup> Ch. 18, 42 Stat. 20 (1921) (amended 1974).

<sup>83</sup> See Morton Rosenberg, "Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive," 57 Geo. Wash. L. Rev. 627, 674 (1989).

<sup>84</sup> See, e.g., *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14-15 (1941).

<sup>85</sup> 462 U.S. 919, 935 n. 9 (1983).

action violates the Bicameralism and Presentment Clause of the Constitution. Despite this ruling, Congress has continued to pass legislation imposing facially invalid legislative veto provisions. Prior administrations objected to these provisions in signing statements, and the Bush II Administration has maintained this practice, issuing approximately 47 statements that contain objections to provisions in legislation passed by Congress that it claims violate the separation of powers principles delineated in *Chadha*.<sup>86</sup> An example of this approach may be found in President Bush's signing statement accompanying the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act. There, the President declared that “[t]he executive branch shall construe certain provisions of the Act that purport to require congressional committee approval for the execution of a law as calling solely for notification, as any other construction would be inconsistent with the principles enunciated by the Supreme Court of the United States in *INS v. Chadha*.<sup>87</sup>

While signing statements that raise broad assertions of executive authority and general constitutional objections to bills passed by Congress may indicate an overly broad conception of presidential power, statements that object to legislative vetoes are supported by Supreme Court precedent. Relatedly, it could be argued that the apparent purpose behind the continued congressional practice of imposing such requirements in turn illustrates the dynamic underlying the objections and assertions of authority that characterize signing statements. Despite the apparent facial unconstitutionality of such provisions, relatively little complaint has been voiced concerning Congress's persistence in passing bills that contain legislative veto provisions. The apparent motivation for this practice arises from the fact that while Congress and its committees may not anticipate formal legal compliance with such provisions and often do not expect to be able to enforce them, pragmatic political considerations oftentimes result in substantive acquiescence by the agencies involved.<sup>88</sup> In essence, the passage of legislative veto provisions subsequent to *Chadha* constitutes an attempt by Congress to leverage informal compliance from executive agencies, the implicit message being that the affected agency may face difficulties in the legislative, oversight or budgetary processes if it does not accede to congressional will in this context. Accordingly, a presidential signing statement objecting to a legislative veto provision serves not only as a response to perceived encroachment on Executive Branch prerogatives, but also as a declaration that the administration expects, and will be supportive of, the rejection of such congressional assertions of authority by affected agencies.

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<sup>86</sup> See United States Senate, Committee on the Judiciary, Statement of Michelle E. Boardman, Deputy Assistant Attorney General, Office of Legal Counsel, United States Department of Justice, on Presidential Signing Statements, June 27, 2006.

<sup>87</sup> *Id.*

<sup>88</sup> See Louis Fisher, “The Legislative Veto: Invalidated, it Survives,” 56-AUT Law & Contemp. Probs. 273 (1993).

## Institutional Implications of Signing Statements

The generalized nature of the constitutional objections and assertions of authority that pervade signing statements, coupled with the fact that such instruments do not have any legal force or effect in and of themselves, lends support to the notion that the Bush II Administration is employing these instruments as a means by which it can make broad claims to extensive and exclusive authority. This approach necessarily raises questions regarding the impact of signing statements on the exercise of executive authority in relation to the traditional roles of Congress and the Judiciary.

### **Statutory Construction and the Courts.**

With regard to the Judicial Branch, the primary consideration is whether the courts have in fact begun to give a degree of determinative weight to signing statements in a manner akin to traditional sources of legislative history. As noted above, one of the factors that appears to have motivated the increase in the issuance of signing statements beginning in the Reagan Administration was to encourage judicial reliance upon the viewpoints contained therein. After persuading West Publishing Company to include signing statements along with legislative histories contained in the *United States Code Congressional and Administrative News*, Attorney General Edwin Meese stated that this inclusion would facilitate the use of signing statements by courts “for future construction of what the statute actually means.”<sup>89</sup>

Despite these efforts, it does not appear that courts have incorporated signing statements in the manner hoped for by the Reagan Administration, presumably due to traditional practice as motivated by constitutional precepts. In particular, it could be argued that while there is little support for the notion that the Constitution somehow implicitly forbids the issuance of signing statements, the nature of the President’s role in vetoing or approving legislation has nonetheless militated against courts granting interpretive weight to signing statements. Specifically, while the Constitution provides that the President is to note his objections upon the veto of a bill, there is no corresponding requirement that he announce his reasons for its approval. In turn, there is a constitutionally prescribed procedure by which Congress is to consider objections raised by a President in formulating a response to a veto, but not for congressional response to a signing statement. While this dichotomy does not require that courts disregard signing statements (as there is likewise no corresponding constitutional validation of committee reports, floor debates and other legislative history),<sup>90</sup> it arguably lends weight to the notion that presidential signing statements should be discounted when they conflict with congressional explanations that have traditionally enjoyed judicial deference. In particular, a well established rule for resolving conflicts in legislative history establishes that when the two Houses have disagreed on the meaning of identical language in a bill that did not go to conference, the explanation that was before both Houses prevails in the event that the court turns

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<sup>89</sup> See CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by George Costello, at p.48 (2006).

<sup>90</sup> *Id.* at 49.

to the legislative history. The rationale is that congressional intent should depend upon the actions of both Houses. Accordingly, given that Congress has no opportunity to act in response to interpretations set forth in signing statements, there is lessened support for the notion that courts should rely upon them to interpret the aim of a congressional enactment.<sup>91</sup>

A related issue arising from this constitutional provision centers on the fact that the President may only approve or veto a bill in its entirety. The President does not possess inherent line-item veto authority, and it is well established that Congress cannot grant the President such authority by statute.<sup>92</sup> Thus, it could be argued that if the courts were to give determinative weight to signing statements in negating statutory provisions a President would effectively possess power analogous to a line item veto.<sup>93</sup> However, there is no indication that this has occurred, rendering this dynamic of greater interest in relation to the impact of signing statements on Executive Branch interaction with Congress.

Information contained in signing statements may be entitled to more significant judicial consideration if the President or his Administration worked closely with Congress in developing the legislation, and if the approved version incorporated the President's recommendations.<sup>94</sup> This principle can be applied not only to bills introduced at the Administration's behest, but also to bills the final content of which resulted from compromise negotiations between the Administration and Congress.<sup>95</sup> In such circumstances, of course, signing statements are used to explain rather than negate congressional action, and are most valuable as lending support to congressional explanations.

Although signing statements are not generally treated as a significant part of legislative history by the courts, they nonetheless affect interpretation by virtue of the effect of directives contained therein on actions taken by administering agencies. Courts grant a high degree of deference to interpretations of agencies charged with implementing statutes, premised on the notion that Congress has authorized the agency to "speak with the force of law" through a rulemaking or other formal process. Congress has not authorized the President to speak with the force of law

<sup>91</sup> *Id.* at 49-50.

<sup>92</sup> *Clinton v. City of New York*, 524 U.S. 417 (1998) (invalidating the Line Item Veto Act as inconsistent with the Presentment Clause of Art. I, § 7, cl.2).

<sup>93</sup> Marc N. Garber and Kurt A. Wimmer, "Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power," 24 Harv. J. on Legis. 363, 376 (1987).

<sup>94</sup> "It may . . . be appropriate for the President, when signing legislation, to explain what his (and Congress's) intention was in making the legislation law, particularly if the Administration has played a significant part in moving the legislation through Congress." 17 Op. Off. Legal Counsel, n.26, *supra*, at 136.

<sup>95</sup> "[T]hough in some circumstances there is room for doubt as to the weight to be accorded a presidential signing statement in illuminating congressional intent . . . , President Reagan's views are significant here because the Executive Branch participated in the negotiation of the compromise legislation." *United States v. Story*, 891 F.2d 988, 994 (2d Cir. 1989).

through signing statements. So, although signing statements may influence or even control agency implementation of statutes, it is the implementation, and not the signing statement itself, that would be measured against the statute's requirements. At most, signing statements might be considered analogous to informal agency actions, entitled to respect only to the extent that they have the power to persuade.<sup>96</sup>

Ultimately, it does not appear that the courts have relied on signing statements in any appreciably substantive fashion. As touched upon above, the references made to signing statements in the Supreme Court's decisions in *Bowsher v. Synar* and *INS v. Chadha* were perfunctory in nature. Furthermore, in *Hamdan v. Rumsfeld*, the Supreme Court made no reference whatsoever to the President's signing statement in rejecting the contention that the Detainee Treatment Act did not apply to pending habeas petitions of Guantanamo detainees.<sup>97</sup>

### **Impact on Congress.**

One of the main complaints lodged by the ABA Task Force in opposition to the issuance of presidential signing statements is based on the viewpoint that the objections and challenges raised therein improperly circumvent the veto process delineated in the Constitution.<sup>98</sup> According to this argument, the President, by refusing to veto a bill that contains provisions he does not intend to enforce, expands the presidential role in lawmaking beyond the constitutional parameters of "recommending...laws he thinks wise and...vetoing...laws he thinks bad,"<sup>99</sup> and deprives Congress of the opportunity override a presidential veto.

While this position has a degree of intuitive appeal in light of the maxims pronounced in cases such as *Youngstown*, it could misapprehend the nature of signing statements as presidential instruments as well as the actual substantive concerns that underlie their issuance. First, as the signing statements discussed above illustrate, it is exceedingly rare for a President to make a direct announcement that he will categorically refuse to enforce a provision he finds troublesome. Instead, the concerns voiced in the statements are generally vague, with regard both to the nature of the objection and what circumstances might give rise to an actual conflict. The ABA Task Force Report's concern on this point also seems to assume that the interpretation and application of congressional enactments is a black and white issue, when, in reality, inherent ambiguity in the text almost always allows for competing interpretations of what the provision at issue requires. Given this dynamic, it is not surprising that a President's interpretation of a law, as announced in a signing statement, would be informed by a broad conception of executive authority. More fundamentally, a signing statement does not have the effect of a veto. A bill that is vetoed does not become law unless reenacted by a supermajority vote of the

<sup>96</sup> See Costello, n.90, *supra*.

<sup>97</sup> *Hamdan v. Rumsfeld*, No. 05-154, slip op. (U.S. June 29, 2006). It is interesting to note, however, that Justice Scalia chided the Majority for "wholly ignor[ing]" the President's signing statement in his dissent. *Id.* at 113-14.

<sup>98</sup> ABA Task Force Report, n.3, *supra*, at 21.

<sup>99</sup> *Youngstown*, 343 U.S. at 587.

Congress. Conversely, a bill that is signed by the President retains its legal effect and character, irrespective of any pronouncements made in a signing statement, and remains available for interpretation and application by the courts (if the provision is justiciable) and monitoring by Congress.

A closely-related argument, also raised in the ABA Report, is that signing statements that raise objections to provisions of an enactment constitute the exercise of a line-item veto.<sup>100</sup> In *Clinton v. New York*, the Supreme Court held that the Line Item Act violated the constitutional requirement of bicameralism and presentment by authorizing the President to essentially create a law which had not been voted upon by either House or presented to the President for approval and signature.<sup>101</sup> Accordingly, this argument posits that when the President issues a signing statement objecting to certain provisions of a bill or declaring that he will treat a provision as advisory so as to avoid a constitutional conflict, he is, in practical effect, exercising an unconstitutional line-item veto. The counterpoints to this argument are similar to those adhering to the premise that signing statements constitute an abuse of the veto process. While an actual refusal of a President to enforce a legal provision may be characterized as an “effective” line-item veto, the provision nonetheless retains its full legal character and will remain actionable, either in the judicial or congressional oversight contexts.

Ultimately, both of these objections, as with the general focus of concern on signing statements as presidential instruments, may obscure the substantive issue that has apparently motivated the increased use of the constitutional signing statement by President Bush: an expansive conception of presidential authority, coupled with a willingness to utilize fully mechanisms that will aid in furthering and buttressing that philosophy. Given the general and hortatory nature of the language that characterizes these signing statements, it seems apparent that President Bush is using this instrument as part of a comprehensive strategy to strengthen and expand executive authority generally, as opposed to a de facto line item veto. Indeed, while the breadth and number of provisions called into question by President Bush draw attention to the institution of the signing statement itself, Professors Curtis A. Bradley and Eric A. Posner have stated that “critics of the Bush administration’s use of signing statements have not identified a single instance where the Bush Administration followed through on the language in the signing statement and refused to enforce the statute as written.”<sup>102</sup>

In light of these factors, some might argue that the Bush II Administration’s practice of issuing signing statements is beneficial, in that the statements alert Congress to the universe of provisions that are held in disregard by the Executive Branch, in turn affording Congress the opportunity not only to engage in systematic monitoring and oversight to ensure that its enactments are complied with, but to assert its prerogatives to counteract the broad claims of authority that undergird the

<sup>100</sup> ABA Task Force Report, n.3, *supra*, at 18; See also, Fein, n.48, *supra*; Bradley and Posner, n.32, *supra*, at 25.

<sup>101</sup> *Clinton*, 524 U.S. at 446.

<sup>102</sup> Bradley and Posner, n.32, *supra*, at 20.

statements. In particular, while the focus on the institution of the presidential signing statement as a source of controversy may be misplaced, congressional interest in the protection of its own institutional prerogatives could ultimately motivate a reaction to the Bush II Administration's expansive view of presidential authority as expressed not only in signing statements, but in executive orders, OLC opinions, internal White House Memoranda, and refusals to accede to congressional and legislative branch agency requests for information. All of these tools have been used by President Bush to exert control over executive personnel in their administration of statutory obligations and interaction with Congress. Additionally, the broad and persistent nature of the claims of executive authority forwarded by President Bush appear designed to inure Congress, as well as others, to the belief that the President in fact possesses expansive and exclusive powers upon which the other branches may not intrude.

Various bills have been introduced in the 109<sup>th</sup> Congress with the aim of restraining the use of signing statements, but it does not appear that any of these legislative measures would appreciably alter or confine the current administration's approach. The first section of H.R. 5486 provides that “[n]one of the funds made available to the Executive Office of the President, or to any Executive agency...from any source may be used to produce, publish, or disseminate any statement made by the President contemporaneously with the signing of any bill or joint resolution presented for signing by the President.” This section does not give any indication as to when such a statement would cease to be “contemporaneous” with the signing of a bill, but under a practical interpretation of the term, it seems unlikely that this section would impose a substantial impediment to the issuance of signing statements. This section would also not appear to prevent contemporaneous declarations by Executive Branch agencies. The second section of H.R. 5486 goes on to state that “[f]or purposes of construing or applying any Act enacted by the Congress, a Federal entity shall not take into consideration any statement made by the President contemporaneously with the President's signing of the bill or joint resolution that becomes such Act.” This command indicates that the first section may not necessarily prevent a President from issuing a signing statement. Furthermore, nothing in the bill would prevent a President from simply issuing memoranda or other declarations aimed at guiding agency interpretation and implementation.<sup>103</sup>

H.J.Res. 87 and H.J.Res. 89 would require the President to provide notification to Congress “[i]f at the time of enactment of a law the President makes a determination not to carry out any duly enacted provision of the law,” and would establish expedited procedures in the House for consideration of legislation developed in response to such a determination.<sup>104</sup> The scope of this legislation is not

<sup>103</sup> See Louis Fisher, “Signing Statements: What to Do?,” *The Forum*: Vol. 4: No. 2, Article 7 (2006).

<sup>104</sup> These bills are identical, except that H.J.Res. 89 provides that the President would only be required to submit a notification to the congressional intelligence committees with regard to determinations involving classified materials. Section 3 of both resolutions also provide that any Member of the House would be authorized to request a report from the General Counsel of the House describing any legal actions that could be brought to challenge the  
(continued...)

entirely clear. As touched upon above, it is quite rare for a signing statement to contain a specific declaration that a law will not be enforced. Furthermore, the generalized nature of the language that is employed in such statements would usually make it difficult to assert that the President had made a concrete determination to not enforce the law (raising the additional possibility that the President would simply ignore this requirement on the grounds that no such determination had been made).

Finally, S. 3731 would attempt to imbue both Chambers of Congress with legal standing to challenge a signing statement, providing that any court of the United States would be authorized to rule on the legality of a signing statement “upon the filing of an appropriate pleading by the United States Senate, through the Office of Senate Legal Counsel, and/or the United States House of Representatives, through the Office of General Counsel for the United States House of Representatives.”<sup>105</sup> It is not clear that this provision would satisfy either the “case or controversy” or standing requirements of Article III of the Constitution.<sup>106</sup> This bill would likewise prohibit any state or federal court from relying on, or granting deference to, a presidential signing statement as a source of authority.<sup>107</sup> Apart from the potential constitutional issues adhering to congressional attempts to restrict courts from considering such information, there is little indication that signing statements have played any substantive role in influencing judicial rulings.<sup>108</sup>

While the broad and continuing assertions of authority made by President Bush in numerous signing statements have the potential to impact Congress at a practical and institutional level, both by discouraging federal officials from engaging in open interaction with congressional committees and staff and by arguably discounting the constitutional prerogatives enjoyed by Congress, the aforementioned legislative proposals may be seen as failing to address the purpose and impact of these instruments. By focusing its efforts on attempting to constrain the President from issuing signing statements that call the validity of its enactments into question, Congress could leave unaddressed any risks posed to its institutional power by the broad conception of presidential authority that arguably motivates their issuance. It does not seem likely that a reduction in the number of challenges raised in signing statements, whether caused by procedural limitations or political rebuke, will necessarily result in any change in a President’s conception and assertion of executive authority. Accordingly, a more effective congressional response might be to focus on any substantive actions taken by the Bush II Administration that are arguably designed to embed that conception of presidential power in the constitutional framework.

<sup>104</sup> (...continued)

President’s refusal to enforce a provision of law.

<sup>105</sup> S. 3731, §5.

<sup>106</sup> See, e.g., *Raines v. Byrd*, 521 U.S. 811 (1997). See also, Laurence H. Tribe, “Signing Statements are a Phantom Target,” *The Boston Globe*, August 9, 2006.

<sup>107</sup> S. 3731, §4.

<sup>108</sup> See n.88 and accompanying text, *supra*.

## Conclusion

Presidential signing statements have a long historical pedigree and there is no discernible constitutional or legal impediment to their issuance. While such statements have become increasingly common since the Reagan Administration and have increasingly been utilized by Presidents to raise constitutional or interpretive objections to congressional enactments, that increased usage does not render them unconstitutional. While the broad assertions of executive authority contained in these statements carry significant implications, both practical and constitutional, for the traditional relationship between the Executive Branch and Congress, they do not have legal force or effect, and have not been utilized to effect the formal nullification of laws. Instead, it appears that recent administrations, as made apparent by the voluminous challenges lodged by President George W. Bush, have employed these instruments in an attempt to leverage power and control away from Congress by establishing these broad assertions of authority as a constitutional norm. It can be argued that the appropriate focus of congressional concern should center not on the issuance of signing statements themselves, but on the broad assertions of presidential authority forwarded by Presidents and the substantive actions taken to establish that authority. Accordingly, a robust oversight regime focusing on substantive executive action, as opposed to the vague and generalized assertions of authority typical of signing statements, might allow Congress in turn to more effectively assert its constitutional prerogatives and ensure compliance with its enactments.